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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

CHoPP COMPUTER CORPORATION, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
PAINEWEBBER INCORPORATED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: May 17, 1994

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QUESTIONS PRESENTED

1. Whether a federal court has jurisdictional power to review, recharacterize or overrule the prior exercise of equitable jurisdiction by a state court concerning rights in property under the state court's control.

2. Whether compliance with a federal-court order to liquidate an account and transfer the proceeds to the United States confers immunity on the transferor against civil liability for knowingly violating a prior state-court preliminary injunction under which the account was frozen at the time of the transfer.

3. As the dissenting judge below aptly put the issue, whether "the United States can step in and seize the funds in a judgment debtor's investment account, even though it knows that a state court has *already* issued a preliminary injunction against the debtor's use of those funds in another judgment creditor's favor" (5 F.3d at 1352 (emphasis in original)), thus "reward[ing] the United States for its amoral behavior by turning an illegal act into an irremediable *fait accompli*" (5 F.3d at 1353).

LIST OF PARTIES AND RULE 29.1 LISTING

The parties to the proceedings below were petitioner CHoPP Computer Corporation, Inc. and respondents United States of America and PaineWebber Incorporated. The parent company of Petitioner is CHoPP Computer Corporation, and its only non-wholly-owned subsidiary is Mosaic Multisoft Corporation. PaineWebber Incorporated did not respond to Petitioner's request for identification of any subsidiaries required to be listed under Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner CHoPP Computer Corporation, Inc. ("CHoPP") respectfully prays that a writ of certiorari issue to review the judgment and majority opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 29, 1993, as to which the court of appeals denied CHoPP's petition for rehearing on February 16, 1994.

OPINIONS AND ORDERS BELOW

The court of appeals' opinion is published at 5 F.3d 1334 and is set out in Appendix A hereto. Its judgment and

its order denying CHoPP's petition for rehearing are set out in Appendices B and C hereto.

The district court's order granting the United States' motion for summary judgment and denying CHoPP's cross-motion for summary judgment and the district court's order granting PaineWebber's motion for summary judgment and denying CHoPP's cross-motion for summary judgment and motion for reconsideration of the order with respect to the United States are unpublished and are set out in Appendices D and E hereto.

JURISDICTION

The court of appeals' opinion was filed on September 29, 1993. That court's order denying CHoPP's timely petition for rehearing was entered on February 16, 1994. This Court has jurisdiction to review the court of appeals' judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Pursuant to 28 U.S.C. §§ 1346(b) and 1332, CHoPP commenced suit in the district court on January 22, 1991. CHoPP based its claims on the wrongful seizure by the United States of $694,000 held by PaineWebber and equitably owned by CHoPP, which the United States used to pay criminal fines levied against one Aleksandrs V. Laurins ("Laurins") and Gold Depository & Trust Company ("GDTC"), a company that Laurins controlled. CHoPP had initially established its ownership of the fund by obtaining a preliminary injunction from the Superior Court of the State of California for the County of San Francisco (the "Superior Court") freezing the fund pending trial. Upon trial, CHoPP conclusively established its ownership when the Superior Court *ab initio* imposed a constructive trust over the fund in CHoPP's favor. CHoPP's complaint below alleged the facts

described in the following sections, and Respondents disputed none of them.

A. Entry Of The Preliminary Injunction In CHoPP's Superior Court Action

On August 4, 1986, CHoPP filed a complaint in the Superior Court against Laurins, Co-Op International Trust Company ("Co-Op") and a number of individuals and entities affiliated with them. In pertinent part, CHoPP alleged that Laurins and his co-defendants had engaged in a scheme to manipulate the market price of CHoPP stock and to profit from illegal short-selling. CHoPP claimed that the proceeds of such trading, including trading in Co-Op's account at PaineWebber, always equitably belonged to CHoPP. On August 25, 1986, CHoPP obtained a preliminary injunction freezing all such proceeds based on the Superior Court's finding that CHoPP was likely to prevail on its ownership claim at trial.[1] CHoPP promptly served a copy of the preliminary injunction on PaineWebber.[2]

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1 *See* Cal. Bus. & Prof. Code § 17203 (authorizing equitable orders that include appointment of receiver and issuance of an injunction freezing property acquired through unlawful business practices); *Usaco Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 97-98 (6th Cir. 1982) (authorizing injunction under RICO that "preserves assets for which the defendants may be accountable under a constructive trust," distinguishing *DeBeers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220-23 (1945), which precludes sequestration of assets to secure a potential *damage* award).

2 It is critical to the issues raised by this petition to recognize that CHoPP could not have obtained such an injunction (as opposed perhaps to an attachment) unless it established that it would prevail not on its damage claim but on its claim to the *specific* property that it sought to freeze. *See Doyka v. Superior Court*, 233 Cal. App. 3d 1134, 285 Cal. Rptr. 14 (1991). *Accord DeBeers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220-23 & n.14 (1945).

B. Criminal And Execution Proceedings Against Laurins And GDTC

In December 1986 and August 1987, respectively, the United States obtained judgments (a) against GDTC imposing a $444,000 fine ($1,000 per day for its continuing refusal to comply with a prior court order directing disclosure of information) and (b) against Laurins imposing a $250,000 fine (and an eight-year prison term) upon his conviction on contempt-of-court and obstruction-of-justice charges.[3] In seeking to execute on these judgments, the United States had only the same California rights and remedies as a private, civil-money-judgment creditor would have had. *E.g.*, *Custer v. McCutcheon*, 283 U.S. 514, 519 (1931); Fed. R. Civ. P. 69(a).

On March 29, 1988, with actual knowledge of CHoPP's preliminary injunction in the Superior Court, the United States obtained an *ex parte* order from the district court, at PaineWebber's urging, directing PaineWebber to

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[3] The proceedings that gave rise to these judgments concerned wrongful withholding of evidence in a civil tax case brought by the United States against GDTC and were unrelated to Laurins' and Co-Op's illegal activities on which CHoPP based its claims. Even if the United States had been seeking to enforce a tax lien against Laurins (which it was not), its right to proceed would have depended upon Laurins actually having had equitable title (not merely Co-Op's legal title) to the property seized. Where, as here, the debtors (Laurins and Co-Op) had obtained the property by fraud, a constructive trust in favor of the equitable owner (CHoPP) would have had priority even if it had been imposed *after* the seizure by the United States. *See, e.g., Carter v. United States*, 82-1 U.S. Tax Cas. (CCH) ¶ 9314 (N.D. Cal. 1981).

liquidate Co-Op's position in CHoPP stock[4] and to pay $694,000 of the proceeds to the United States pursuant to writs of execution issued in November 1987 and January 1988. The United States did not tell the district court about the Superior Court preliminary injunction, did not tell the Superior Court about the United States' interference with that court's jurisdiction and did not give CHoPP notice and an opportunity to be heard before the district court entered the March 29 order. On April 26, 1988, without notice to CHoPP or the Superior Court, PaineWebber complied with the district court order, violated the Superior Court preliminary injunction binding on it as Laurir and Co-Op's agent and forwarded checks totaling $694,000 to the United States.

C. CHoPP's Demand For Return Of Its Funds

In May 1988, CHoPP learned what had happened and demanded that the United States return the funds taken in violation of the Superior Court's preliminary injunction and Cal. Civ. Proc. Code § 700.180(b), which precludes

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4 Co-Op was not the United States' judgment debtor, and there was no "evidence" before the district court of any connection between Co-Op and either Laurins or GDTC. The United States' *ex parte* application, unsupported by any declaration or other evidence on this point, simply recited that the Co-Op account at PaineWebber was "controlled by Laurins." The application made no mention of CHoPP, the pendency of the action in the Superior Court or the existence of the preliminary injunction.

execution on property that is the subject of a pending action.[5] The United States refused to comply.

In March 1990, CHoPP submitted an administrative claim to the Attorney General of the United States under the Federal Tort Claims Act. By letter dated August 2, 1990, the United States notified CHoPP that it would not voluntarily pay anything to resolve CHoPP's claim.

D. The Superior Court Judgment Settling CHoPP's Ownership Of The Funds

On September 17, 1990, CHoPP's action in the Superior Court finally went to trial. On October 26, 1990, the Superior Court entered final judgment under RICO and California law, which, among other things, made the preliminary injunction permanent, determined that from the dates of the illegal trading (*i.e.*, two years before the United States' seizure) CHoPP had *always* been the equitable owner of the proceeds of such trading and directed PaineWebber to deliver such proceeds to CHoPP.

E. Proceedings Below In The District Court

On the basis of these facts, CHoPP's complaint in the action below asserted two damage claims against the United States and PaineWebber: one for conversion of CHoPP's funds and one for violation of the preliminary injunction. On March 15, 1991, the district court granted the United States'

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5 A judgment creditor can obtain only such interest in property that its debtor both has and can transfer, equitable infirmities and all. Cal. Civ. Proc. Code § 695.030(a) ("property of the judgment debtor that is not assignable or transferable is not subject to enforcement of a money judgment"); *Wheeler v. Trefftzs*, 228 Cal. App. 2d 271, 274, 39 Cal. Rptr. 507 (1964). A judgment creditor can obtain a *lien* on whatever interest its debtor is determined to have in such property, and thus can fully protect its *legitimate* rights, by filing a notice in the action. Cal. Civ. Proc. Code §§ 700.180(e) and 708.410 et seq.

motion for summary judgment and denied CHoPP's cross-motion for summary judgment against the United States. A written order memorializing this ruling was entered on April 5, 1991, and is reproduced in Appendix D hereto. On May 24, 1991, the district court granted PaineWebber's motion for summary judgment and denied CHoPP's cross-motion for summary judgment against PaineWebber and CHoPP's motion for reconsideration of the district court's prior resolution of the cross-motions for summary judgment as between CHoPP and the United States.[6] Final judgment memorializing the district court's rulings was entered on June 10, 1991, and is reproduced in Appendix E hereto.

The district court ruled that, even though CHoPP's property had been used to pay Laurins' and GDTC's fines: (1) CHoPP could recover nothing on its conversion claim because PaineWebber had released the funds to the United States before the Superior Court entered final judgment determining that those funds had always belonged to CHoPP and (2) the United States and PaineWebber were not liable for violation of the preliminary injunction (a) because they were not named therein and the United States was not a "successor in interest" to any party who was named and (b)

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6 On April 29, 1991, CHoPP submitted a second administrative claim that took account of the district court's April 5 ruling and sought damages for the United States' conversion of the disputed funds by *retaining* them after the Superior Court conclusively determined that they belonged to CHoPP rather than to the United States' judgment debtors. *See, e.g.*, 5 B. Witkin, *Summary of California Law*, Torts § 622(2), at 716 (9th ed. 1988) (emphasis in original) ("Even where possession of property has been lawfully acquired, *wrongful withholding* is actionable. Hence, where the person entitled to possession demands it, the unjustified refusal to give it up is a conversion."). The United States denied CHoPP's second administrative claim on October 22, 1991. The majority of the court of appeals held that CHoPP's claim was invalid (5 F.3d 1350-51).

because the exclusive remedy for violation of an injunction is a contempt proceeding rather than a damage claim.

F. Proceedings Below In The Court Of Appeals

CHoPP timely appealed the final judgment to the United States Court of Appeals for the Ninth Circuit. In a 2-to-1 decision over a strong dissent, the court of appeals affirmed on September 29, 1993. The majority held that, contrary to the district court's ruling, CHoPP would have a damage remedy for violation of the preliminary injunction but that such a remedy was not available against the United States because it was not a "successor in interest" to Laurins or Co-Op and was not available against PaineWebber because, although PaineWebber had held the disputed funds as agent for Laurins and Co-Op, it "acted on its own authority" and not as agent when it transferred those funds to the United States pursuant to the district court's execution order (5 F.3d at 1351).

To reach these conclusions and to nullify the Superior Court's pre-existing equitable jurisdiction and control over the disputed fund, the majority of the court of appeals mischaracterized the proceedings that had taken place in the Superior Court before the United States purported to execute on the funds:

1. Even though the law would have forbidden exercise of the Superior Court's injunctive and constructive-trust powers in connection with a claim for damages, the court below said:

> "CHoPP's state court action was not one to determine ownership of the PaineWebber account, but rather one to establish Laurins' civil liability to CHoPP" (5 F.3d at 1349).

2. Even though the Superior Court's final judgment specifically provided that CHoPP *was* the equitable owner of Co-Op's account *ab initio*, the court below said:

> "CHoPP did not hold equitable title to the PaineWebber account at the time of the levy" (5 F.3d at 1350).

3. Even though in its first cause of action in the Superior Court CHoPP claimed the specific proceeds of Co-Op's illegal trading of CHoPP stock and even though the Superior Court upheld that claim both preliminarily and permanently, the court below said:

> "CHoPP is simply not in the position of a plaintiff who seeks return of an identifiable res wrongfully taken or wrongfully withheld" (5 F.3d at 1350).

This petition addresses the legal implications of these mischaracterizations, rather than any issue of state law.[7]

CHoPP filed a petition for rehearing on October 13, 1993, which the court of appeals, by the same 2-to-1 margin, denied on February 16, 1994. A copy of the court's order is reproduced in Appendix C hereto.

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7 That said, however, it is well to point out that, where the majority and dissenting opinions below differed on matters of California law, the dissent was correct.

REASONS FOR GRANTING THE WRIT

I.

IN "OVERRULING" EQUITABLE ORDERS MADE BY THE CALIFORNIA SUPERIOR COURT, THE NINTH CIRCUIT'S MAJORITY OPINION VIOLATES ELEMENTAL PRINCIPLES OF FEDERALISM AND CONFLICTS WITH DECISIONS OF THIS COURT

This case presents the unseemly clash of a state court and a federal court purporting to exercise directly conflicting equitable powers to resolve the ownership and disposition of property. The majority ruling below retroactively nullified the power of the Superior Court, thus challenging core principles of federalism greatly disturbed by the lack of respect by one sovereign judiciary for the power and orders of another. The majority below impliedly arrogated to the federal courts both the power to vacate, as incorrect under California law, a preliminary injunction entered by a California court and the power to proceed as if that injunction and the Superior Court's subsequent final judgment did not exist. Since the beneficiary of the ruling was the United States itself, and its lawyers obtained the disputed property through what the dissenting judge branded an "illegal act" and "amoral behavior" (5 F.3d at 1353), the case is especially troubling and deserving of this Court's review.

It is important again to note that CHoPP does not ask the Court to review any issue of California law on which the court below opined. The point of this petition is that the court below lacked jurisdictional power to review, recharacterize or dispute the proceedings and orders in the Superior Court, even assuming *arguendo* that they were mistaken. *See generally Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986) (challenge to possibly-mistaken state-court rejection of res-judicata claim based on

prior federal judgment must be pursued exclusively through state-court appeal and certiorari from this Court).

Although the majority below acknowledged in passing that a preliminary injunction such as CHoPP's could be appropriate *only* where ownership of specific assets is in controversy and could not be used to freeze a defendant's other assets to secure satisfaction of an expected final money judgment (5 F.3d at 1349), it nonetheless held effectively that CHoPP's preliminary injunction was such an animal and that the property frozen by the Superior Court was not a "subject" of CHoPP's action as to which the Superior Court could make a final order.[8] *See United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 478 (1936) (rejecting United States' attempted recharacterization of state-court proceeding as being for damages only). Only from that improper starting point did the majority opinion approve the United States' and PaineWebber's having proceeded as if this were nothing more than a race between competing general creditors, which the United States won (albeit by concealing the existence of the Superior Court injunction in obtaining an *ex parte* liquidation and seizure order from an unknowing district court).

The majority opinion conflicts with this Court's decisions standing for the proposition that where one court has assumed equitable jurisdiction over property (*i.e.*, once property is *in custodia legis*), a second court of coordinate jurisdiction cannot overrule or interfere with the first court's

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8 The majority's mischaracterization of the proceedings was belied not only by CHoPP's complaint in the Superior Court and the Superior Court's preliminary injunction but also by the Superior Court's final judgment confirming CHoPP's rights as owner and directing PaineWebber to deliver the property to CHoPP.

orders even if it disagrees with them.[9] To challenge the exercise of such jurisdiction, a party must apply to the first court, or to an appellate court having the power to review the orders of the first court. *E.g.*, *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 77, 90 (1923) (citations omitted):

> "[I]f the legality of the state court's action was to be questioned, it could be done only by laying the proper foundation through appropriate proceedings in that court. . . . If such action had been taken and relief had been denied there, resort could then have been had to appellate proceedings. . . . But the judgment of the state court, which had possession of the *res*, could not be set aside by a collateral attack in the federal courts. . . . Nor could it be ignored. . . . Lower federal courts are not superior to state courts."

In *Covell v. Heyman*, 111 U.S. 176 (1884), for example, the Court reversed a judgment of a state court authorizing recovery of property held by a United States marshal acting pursuant to a writ previously issued by the

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9 The majority opinion also conflicts with the Ninth Circuit's own opinion in *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1062-63 (9th Cir. 1991), and the district court opinion in *Ice Prods., Inc. v. World Hockey Ass'n*, 443 F. Supp. 483, 486-87 & n.5 (E.D. Pa. 1977), both of which apply the *custodia legis* doctrine to property subject to court order but not always physically held by the court itself or a party to the proceeding acting under court order. See discussion at pp. 14-15 below (filing of complaint in equity, not physical possession, controls priority between courts).

federal court where jurisdiction had first attached.[10] The Court explained the rationale that applies equally here:

> "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. . . ."

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10 The Court made it clear that it would have ruled consistently if the roles of the state and federal courts had been reversed. 111 U.S. at 179 ("the same principle protects the possession of property while thus held, by process issuing from State courts, against any disturbance under process of courts of the United States").

Similarly, in *Penn General Casualty Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189 (1935), the Court reviewed conflicting state-court and federal-court orders requiring the disposition, and enjoining the disposition, respectively, of certain property. The Court held that since the federal court was the first to have its equitable jurisdiction over the property invoked (by the filing of a bill of complaint), that court was entitled to maintain and exercise such jurisdiction to the exclusion of any other court. 294 U.S. at 195. The Court's reasoning applies here as well (294 U.S. at 196 (citations omitted)):

> "[W]hen the two suits have substantially the same purpose and the jurisdiction of the courts is concurrent, that one whose jurisdiction and process are first invoked by the filing of the bill is treated as in constructive possession of the property, and as authorized to proceed with the cause. . . . Jurisdiction thus attaches upon the filing of the bill of complaint in court, at least where process subsequently issues in due course. . . . The confusion and uncertainty are thus avoided which might otherwise result from the attempt to resolve the troublesome question of what constitutes actual possession and to determine priority of service of process in the two suits."
>
> "In the present case there are outstanding injunctions by both courts restraining any interference with the property in the hands of the insolvent corporation, and neither the Insurance Commissioner nor the district court has taken possession. The suits relate to substantially the same subject matter. . . . [S]ince the bill was filed in the

> district court before the application of the Attorney General to the state court, the jurisdiction of the district court first attached; it has asserted this jurisdiction by its injunction order. Hence, it alone can rightfully assert control over the property and proceed with litigation which affects that control . . . and it alone can determine how far it will permit any other court to interfere. . . ."

There would be no doubt of the impropriety of the majority ruling below if, before execution by the United States, the Superior Court's exercise of its equitable power had been to take the property physically into its own registry or to appoint a receiver to hold the property.[11] *E.g.*, *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 77 (1923); *Palmer v. Texas*, 212 U.S. 118, 125, 129-30 (1909). What matters, however, is the priority of the Superior Court's exercise of equitable jurisdiction over the disputed property not the form of that exercise.

In addition to mischaracterizing the Superior Court proceedings, the majority below also mischaracterized PaineWebber's role--and thus its liability--in saying that, even though the preliminary injunction was binding on the enjoined defendants' agents (5 F.3d at 1351) and even though, as Co-Op's broker, PaineWebber held the frozen property as its agent (5 F.3d at 1351), PaineWebber was not liable for violating the injunction because did not transfer the funds to the United States at Laurins' or Co-Op's instruction

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11 No receiver was necessary here because the disputed property was simply to be frozen not managed.

but rather "acted on its own authority" (5 F.3d at 1351).[12] Since PaineWebber *held* the property *only* as the defendants' agent, it could hardly have *released* the property in any other capacity. The majority's contrary view immunizing PaineWebber from liability for disobeying the preliminary injunction is simply wrong.

II.

THE CONDUCT OF THE UNITED STATES ATTORNEY'S OFFICE IN OBTAINING *EX PARTE* EXECUTION ORDERS BY CONCEALING THE EXISTENCEOF THE SUPERIOR COURT'S PRELIMINARY INJUNCTION IS AN "ILLEGAL ACT" AND "AMORAL BEHAVIOR" WARRANTING THE EXERCISE OF THIS COURT'S SUPERVISORY POWER

This case involves activity by the United States Attorney in connection with litigation that a member of the court of appeals branded an "illegal act" and "amoral behavior" (5 F.2d 3d at 1353).[13] Such a thing jeopardizes respect for both the executive and the judicial branches of the

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12 Laurins has had criminal liabilities satisfied in full with money that belonged to CHoPP. The majority's speculation that PaineWebber's release of funds was "presumably . . . against its client's wishes" (5 F.3d at 1351) rings hollow indeed.

13 "Good faith required [the United States Attorney] to have advised the Federal District Court of the pendency of the State court proceedings." *Harkin v. Brundage*, 276 U.S. 36, 54 (1928). This Court has not hesitated to hold that chicanery by a party in deliberately withholding notice from a federal court of the pendency of proceedings in a state court requires the federal court to stay its hand in order to allow the state court to exercise its equitable powers. *Id.* at 54-57.

government and cries out for the Court to exercise its supervisory power. As the Court observed in a criminal context in *Berger v. United States*, 295 U.S. 78, 88 (1935):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, . . . is not that it shall win a case, but that justice shall be done. . . . [W]hile he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful [result] as it is to use every legitimate means to bring about a just one."

Accord Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 802-03 (1987).

Knowing that Co-Op's account at PaineWebber was the subject of an action by CHoPP in the Superior Court and knowing that the Superior Court had entered a preliminary injunction freezing Co-Op's account on the ground that CHoPP was likely to prevail at trial on its claim to ownership, the United States applied *ex parte* to the district court and, by concealing these facts, obtained an order in aid of execution that directed PaineWebber to liquidate Co-Op's account and to pay $694,000 of the proceeds to the United States to satisfy criminal and contempt judgments against Laurins and GDTC. This conduct appropriately evoked condemnation in the court below and warrants this Court's intervention.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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May 17, 1994

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHoPP Computer Corporation, Inc., a British Columbia Corporation,
Plaintiff-Appellant,
v.
United States of America; PaineWebber Incorporated, a Delaware Corporation,
Defendants-Appellees.

No. 91-15991
D.C. No. CV-91-00226-RHS
OPINION

Appeal from the United States District Court
for the Northern District of California
Robert H. Schnacke, Senior Judge, Presiding

Argued and Submitted
July 20, 1992—San Francisco, California

Filed September 29, 1993

Before: William C. Canby, Jr., Stephen Reinhardt and Edward Leavy, Circuit Judges.

Opinion by Judge Canby; Dissent by Judge Reinhardt

SUMMARY

Civil Litigation and Procedure/Remedies

The court of appeals affirmed a judgment of the district court. The court held that a constructive trust imposed by a

final California judgment upon a brokerage account did not give the beneficiary retroactive equitable title in the account, such that an independent judgment creditor's execution of levy on the account before the judgment imposing the trust was final amounted to conversion.

Appellant CHoPP Computer Corporation, Inc., sued Alex Laurins in California Superior Court and obtained a preliminary injunction freezing an account that Laurins controlled at appellee PaineWebber Incorporated. Neither PaineWebber nor appellee United States was a party to the state action. While that action was pending, the government obtained a judgment against Laurins in a separate action and levied against the PaineWebber account. PaineWebber delivered funds from the account sufficient to satisfy the judgment. CHoPP subsequently obtained a judgment against Laurins in the state action that included a constructive trust on the PaineWebber account, pursuant to which PaineWebber delivered the balance to CHoPP. CHoPP sued PaineWebber and the government for conversion under California law and the Federal Tort Claims Act. The district court granted summary judgment for the defendants and CHoPP appealed.

[1] Although wrongful intent is not an element of California's definition of conversion as a strict liability tort, trespass, also lacking that element, is actionable under FTCA, and so was CHoPP's conversion claim.

[2] The government was not a party nor a privy of a party in CHoPP's action, but levied on the account independently of and prior to entry of the state judgment and was not estopped thereby to deny CHoPP's title to the funds. [3] Further, there was no California law suggesting that CHoPP's later judgment could impede satisfaction of the government's earlier and competing final judgment. The preliminary injunction was not final and did not purport to impose a trust on the account. Although the constructive trust did so, it was too late to defeat the government's levy. [4] Therefore, the govern-

ment did not convert when it levied, nor did PaineWebber when it delivered.

[5] The government's levy was not reached by California Code of Civil Procedure Section 700.180(b) respecting property that was the subject of a pending action, since CHoPP's action was to establish Laurins's civil liability, not to establish ownership of the account. [6] Moreover, the constructive trust was only a remedy to aid CHoPP in recovering damages and did not render the account over which it was imposed the subject of CHoPP's action for purposes of the statute.

[7] Although the constructive trust gave CHoPP some kind of equitable interest in the account, that interest was perfected after the government's lawful levy and was too weak to overcome the present ownership and possessory interest of the United States.

Judge Reinhardt, dissenting, opined that the majority's opinion was unwarranted in light of precedent and erroneously rewarded the government for improper conduct.

COUNSEL

William T. Bisset, Hughes, Hubbard & Reed, Los Angeles, California, for the plaintiff-appellant.

John D. Giffin, Keesal, Young & Logan, San Francisco, California; Erik P. Doerring, Assistant United States Attorney, San Francisco, California; for the defendants-appellees.

OPINION

CANBY, Circuit Judge

CHoPP Computer Corporation (CHoPP) appeals from the district court's summary judgment in favor of the United

States and PaineWebber Incorporated (PaineWebber), in CHoPP's action for damages arising from an alleged wrongful levy of funds contained in a PaineWebber account. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

Alex Laurins, a former investment promoter, controlled the PaineWebber account. The competing claims to that account arose from separate actions that CHoPP and the United States had pursued against Laurins.

CHoPP sued Laurins and others in 1986, contending that they had engaged in a scheme to disparage CHoPP and thereby drive down the price of CHoPP's stock, so that Laurins and others could profit from short sales of that stock. CHoPP sought to recover profits from the short sale of its stock, wherever found, that resulted from the tortious disparagement. CHoPP obtained a preliminary injunction from the Superior Court for the City and County of San Francisco. That injunction provided, in relevant part:

> A. Pending final resolution of this action, defendants are hereby enjoined from doing any of the following acts:
>
> . . . .
>
> 3. Withdrawing or transferring, directly or indirectly, any proceeds of any "short" sale of CHoPP stock.

CHoPP Computer Corp. v. Laurins, No. 862163, slip. op. at 2 (Cal.Sup.Ct. Aug. 25, 1986) (preliminary injunction). Neither the United States nor PaineWebber was a party to CHoPP's state court action.

Meanwhile, as CHoPP's suit against Laurins was pending, the United States had launched a tax investigation against one

of Laurins' alter ego companies.[1] Laurins' continuing failure to comply with a discovery order of the federal court resulted in a penalty of $444,000, which the United States reduced to judgment. Subsequently, Laurins was convicted in federal court of obstruction of justice and criminal contempt, and was fined $250,000 (and sentenced to a prison term).[2]

The United States then obtained two writs of execution to collect the judgment and fine, which together totalled $694,000. The Government learned of the PaineWebber account that Laurins controlled, and it served the broker with the writs. On February 17, 1990, CHoPP notified the United States of the state court injunction freezing Laurins' short-sale proceeds. The PaineWebber account contained short-sale positions. PaineWebber notified the United States that it would not cooperate in the levy unless the United States obtained a court order requiring PaineWebber to disburse the money. The Government obtained the order from the federal district court (without informing that court of the existence of the injunction), and PaineWebber delivered $694,000 from the account to the government.

In March 1990, CHoPP submitted an administrative claim for $694,000 under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b) (1988). The Attorney General denied CHoPP's claim in August of that year.

Then, in October 1990, after a jury trial, CHoPP and a coplaintiff obtained a judgment in excess of $29 million against the defendants in the state court action. *See CHoPP Computer Corp. v. Laurins*, No. 862163, slip. op. at 2 (Cal.Sup.Ct. Oct. 25, 1990) (final judgment).[3] The superior court judgment provided:

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[1]The alter ego company was Gold Depository & Trust Company.

[2]We affirmed his convictions. *See United States v. Laurins*, 857 F.2d 529 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).

[3]Laurins was in bankruptcy at this time, and the Superior Court had severed CHoPP's claims against him from the rest of the case. However, the nominal owner of the PaineWebber account, Laurins' Co-Op International Trust, remained subject to the final judgment.

> 3. Effective as of the dates of the transactions, a constructive trust is imposed on all profits from any transaction in CHoPP stock by, or on behalf of, for the benefit of, or in the name of any Defendant.
>
> 3. [sic] The preliminary injunction entered by the Court of August 25, 1986, is hereby made permanent, except that PaineWebber Inc. is hereby directed to pay forthwith to the order of the Plaintiffs the entire contents of [the] [a]ccount . . . previously frozen by the Court's preliminary injunction.

Id., slip. op. at 2-3. Pursuant to this judgment, PaineWebber delivered to CHoPP approximately $263,000 that remained in the account.

CHoPP then brought this action against the Government and PaineWebber in the United States District Court for the Northern District of California. CHoPP averred that it had a prior claim to the PaineWebber account. It alleged that the Government's levy and retention of the funds were conversions under California law and the FTCA. It further alleged that PaineWebber's acquiescence in the levy was a conversion. CHoPP also claimed that each defendant had violated the preliminary injunction. The district court granted the defendants' motions for summary judgment and denied CHoPP's cross-motion for summary judgment.

We review summary judgments de novo. *Jones v. Union Pac. R.R.*, 968 F.2d 937, 940 (9th Cir. 1992). In this case there are no disputed material facts. The United States and PaineWebber each knew of the preliminary injunction at the time of the levy. The United States concedes that it refused to return the levied funds to CHoPP after the state court's final judgment had been entered. We therefore ask only whether the district court correctly applied the relevant substantive law. *See Federal Deposit Ins. Corp. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992).

II

California provides the relevant substantive law in this case. That state permits recovery on a conversion theory either for the wrongful taking or for the wrongful retention of property. *See Edwards v. Jenkins*, 7 P.2d 702, 705 (Cal. 1932). In order to maintain an action for conversion, CHoPP must show that it had title to or a right to possess the funds in the PaineWebber account. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 488 (Cal. 1990), *cert. denied*, 111 S.Ct. 1388 (1991); *Baldwin v. Marina City Properties, Inc.*, 145 Cal.Rptr. 406, 416 (Ct.App. 1978). CHoPP's interest must have existed, if at all, at the time of the levy or at the time that CHoPP demanded return of the funds after entry of the final judgment in state court.

A

We pause to consider whether Congress has waived the sovereign immunity of the United States for a conversion, as California law defines that tort. The FTCA subjects the United States to monetary liability for

> [a] loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1988). The United States contends here that because California views a conversion as a strict liability tort, *e.g.*, *Moore*, 793 P.2d at 494 & n.38, CHoPP's conversion claim is beyond the scope of the FTCA. We disagree.

[1] This Circuit has declined previously to address the Government's strict liability argument. *Gardiner Mfg. Co. v.*

United States, 479 F.2d 39, 41 n.2 (9th Cir. 1973).[4] A recent district court opinion, however, squarely rejects the Government's position. *Nottingham, Ltd. v. United States*, 741 F.Supp. 1447, 1448-49 (C.D.Cal. 1991). *Nottingham* analogizes a conversion to a trespass, which the Supreme Court has determined gives rise to FTCA liability, notwithstanding that wrongful intent is not an element of trespass. *Id.* (citing *Hatahley v. United States*, 351 U.S. 173, 181 (1956)). *Nottingham* further distinguishes a conversion from the class of torts involving ultrahazardous activities, which indisputably are beyond the scope of the FTCA. *Id.* at 1448 (distinguishing *Dalehite v. United States*, 346 U.S. 15, 44-45 (1953)). We adopt the well-reasoned analysis and conclusion of Judge Tashima's *Nottingham* opinion, and hold that CHoPP's conversion claim can be brought under the FTCA.

B

[2] CHoPP offers two theories to support its claim that it owned or had a right to possess the PaineWebber account at the time of the government's levy. First, CHoPP argues that the state court's final judgment collaterally estops the United States from denying CHoPP's ownership. We see no reason why that should be so. The United States was neither a party nor a privy of any party in the state court action. *See Dillard v. McKnight*, 209 P.2d 387, 391 (Cal. 1949). The government sought nothing, nor was anything sought from it, in the state court action, directly or indirectly. The government levied on the PaineWebber funds independently of the state court action and prior to entry of the state judgment; the United States accordingly does not acquire the status of privy by becoming

[4]We have recognized a conversion claim under the FTCA on an unrelated basis. *See Love v. United States*, 915 F.2d 1242, 1245-47 (9th Cir. 1989) (holding that federal loan recipients may bring a state law conversion claim to undo a foreclosure, notwithstanding their entitlement to seek recovery for breach of contract under the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (1988)).

" 'one who, *after rendition of the judgment*, has acquired an interest in the subject matter affected by the judgment through or under one of the parties.' " *Boulter v. Commercial Standard Ins. Co.*, 175 F.2d 763, 768 (9th Cir. 1949) (quoting *Bernhard v. Bank of America*, 122 P.2d 892, 894 (Cal. 1942) (emphasis added by *Boulter*)); *cf. In re Mellor*, 734 F.2d 1396, 1401 n.4 (9th Cir. 1984) (judgment lienholder "subject to all *prior* interests in the property") (emphasis added). The United States is not estopped by the state court judgment from denying CHoPP's title to the funds.

CHoPP's next argument is that it had an ownership interest in the PaineWebber account at the time of the levy by reason of the constructive trust. There is California authority that suggests that a constructive trust springs into existence at the moment a wrongful taking occurs. *See, e.g., Broder v. Conklin*, 53 P. 699, 702 (Cal. 1898) (holding that the statute of limitation begins to run when harm arises); *Majewsky v. Empire Construction Co.*, 467 P.2d 547, 556 n.4 (Cal. 1970) (Tobriner, J., dissenting) ("the imposition of a constructive trust restores title to plaintiff *ab initio*"). We do not agree, however, that cases dealing with limitations or other rights between the "trustor" and "trustee" of a constructive trust establish that the imposition of a constructive trust may, under California law, interfere with a third party's prior claim that has been reduced to judgment and levied upon.

[3] The retroactive creation of a constructive trust is not necessarily a self-executing award of equitable title. *See* George G. Bogert and George T. Bogert, *The Law of Trusts and Trustees* Section 472 (Rev.2d ed. 1978); *cf. United States v. 92 Buena Vista Ave.*, 113 S.Ct. 1126, 1135-36 (1993) (plurality op.) (involving the common-law relation back doctrine). There is no California law that suggests that CHoPP may rely upon a 1990 judgment to impede satisfaction in 1988 of a competing judgment that was already final. Nor did the preliminary injunction give CHoPP a prior claim. The preliminary injunction was not final, was not addressed to others than

the parties, and did not purport to impose a trust on the *res* of the PaineWebber account. Only the final state court judgment recognized the existence of a constructive trust, and it came too late for the purpose of defeating the earlier levy of the United States.

CHoPP's view to the contrary, if adopted, would cause disruption that we conclude would not be countenanced by California law. If a retroactive creation of a constructive trust may defeat a prior and otherwise legal levy, one creditor may deter competitors from satisfying their judgments against a common debtor merely by initiating an action that seeks recognition of a constructive trust over the debtor's assets. A third party who proceeded with a levy under those circumstances could be held liable for a conversion.

California experienced a similar problem with its lis pendens procedure. In one case the state court of appeal allowed the filing of a lis pendens on a defendant's home in connection with a fraud suit seeking to impose a constructive trust on the home. *Coppinger v. Superior Court*, 185 Cal.Rptr. 24, 29-30 (Ct.App. 1982). *Coppinger* has since been sharply criticized, perhaps most aptly in *Urez Corp. v. Superior Court*, 235 Cal.Rtpr. 837, 842-43 (Ct.App. 1987):

> This case differs factually from the cases we have discussed but it is most similar to *Coppinger*. It is essentially a fraud action seeking money damages with additional allegations urged to support the equitable remedies of a constructive trust or an equitable lien. Real party does not claim any ownership or possessory interest in the subject property. Rather, he seeks reinstatement or creation of a 'beneficial' interest in the property for the purpose of securing payment of money owed him under his defunct second trust deed.
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> . . . .

> We conclude, therefore, that allegations of equitable remedies, even if colorable, will not support a lis pendens if, ultimately, those allegations act only as a collateral means to collect money damages. It must be borne in mind that the true purpose of the lis pendens statute is to provide notice of pending litigation and not to make plaintiffs secured creditors of defendants nor to provide plaintiffs with additional leverage for negotiating purposes.

Even allowing for the special context of lis pendens, we view *Urez* as a clear indication that California discourages the use of equitable remedies to ward off competing prior lienholders. "Where, as here, the purpose of the constructive trust is only to secure payment of a debt, the plaintiff, like other creditors must rely upon prejudgment attachment procedures." *La Paglia v. Superior Court*, 264 Cal. Rptr. 63, 68 (Ct.App. 1989); *cf. Doyka v. Superior Court*, 285 Cal. Rptr. 14, 16 (Ct.App. 1991) (general injunction freezing defendant's assets pending litigation invalid as amounting to a prejudgment attachment without meeting requirements for attachment).

[4] Our view intimates no characterization of the United States as an innocent transferee. As a judgment lienholder, the Government was ineligible for that status. *In re Mellor*, 734 F.2d 1396, 1401 n.4 (9th Cir. 1984). Moreover, the Government's motive is irrelevant to the success or failure of the conversion claim. *See Poggi v. Scott*, 139 P. 815, 816 (Cal. 1914); 5 B.E. Witkin, *Summary of California Law* § 624 (9th ed. 1988) [hereafter Witkin, *Summary*]. Rather, our view is founded in California's preference, expressed in *Urez*, 235 Cal. Rptr. at 843, that all creditors adhere to even-handed collection rules. We determine, therefore, that the imposition of a constructive trust did not give CHoPP title to the PaineWebber account at the time of the Government's levy. It follows that the United States did not commit a conversion when it levied, and PaineWebber did not commit conversion when it surrendered the funds.

C

[5] CHoPP crafts two theories which it argues relieves it of the burden of showing contemporaneous ownership of the account. First, CHoPP contends that the government's levy was ineffective under California Code of Civil Procedure section 700.180(b), which reaches any "levy upon property that is the subject of an action . . . pending at the time of the levy."[8] Although there is no California authority interpreting section 700.180(b), we conclude that CHoPP's state court action lies beyond the plain language of that provision. We read the phrase "property that is the subject of an action" in its commonly understood meaning: property that is the subject of an action brought to determine who has interests in it. *See, e.g., Evarts v. Jones*, 274 P.2d 185, 187 (Cal.Ct.App. 1954) ("a grantee who acquires title with constructive notice of the pendency of an action to quiet title against his grantor is concluded by a judgment against the latter"). CHoPP's state court action was not one to determine ownership of the PaineWebber account, but rather one to establish Laurins' civil liability to CHoPP.

[6] The constructive trust is only a remedy. *Stansfield v. Starkey*, 269 Cal.Rptr. 337, 347 (Ct.App. 1990). While such a trust may arise in a case where the trust res *is* the subject of the action, as in a suit for specific performance of a real estate contract, that is not the case here. The state court imposed the trust as a means to assist CHoPP in recovering the damages which the jury had awarded for the tort of fraud-

[8]Section 700.180(a) sets out certain categories of property, none of which are involved here, that "may be levied upon pursuant to this article notwithstanding that the property levied upon is the subject of a pending action or special proceeding."

Section 700.180(b) then provides:

> (b) Except as provided in subsection (a), a levy upon property that is the subject of an action or special proceeding pending at the time of levy is not effective.

ulent disparagement. That tangential employment of the remedy did not render the PaineWebber account the "subject of an action ... pending at the time of the levy. . . ." Cal.Civ.Proc. § 700.180(b) (1987).

The analogy to the lis pendens procedure again offers guidance. In that context, the California Court of Appeal has specified that the assertion of a constructive trust is insufficient to prevent the transfer of property that could serve as the *res* of the trust:

> The issue is simply whether the action as pleaded is one that affects title or possession of the subject property . . . . At bottom, the "beneficial" interest real party claims in the subject property is for the purpose of securing a claim for money damages. In our view allegation of this interest is not an action affecting title or possession of real property.

Urez, 235 Cal. Rptr at 842. We find the analogy apt in this case; the subject of CHoPP's action was not the PaineWebber account.

CHoPP next attempts to rely on California case law that permits a plaintiff with title to property, but lacking a right to immediate possession, to maintain a conversion action. CHoPP relies on *Taylor v. S&M Lamp Co.*, 12 Cal.Rptr. 323 (Ct.App. 1961), and *Reynolds v. Lerman*, 292 P.2d 559 (Cal.Ct.App. 1956), both of which ruled that a plaintiff with title need not have a right to possession to bring a conversion claim. These cases are not of aid to CHoPP, however, because CHoPP has shown *neither* title nor a right to possession. As we have held above, CHoPP did not hold equitable title to the PaineWebber account at the time of the levy.[8]

[8]CHoPP's reliance on these cases is also defeated by our finding that neither the United States nor PaineWebber was subject to, or in violation of, the preliminary injunctions. *See infra* section III.

D

CHoPP responds that, even if the United States did not commit conversion when it levied upon the PaineWebber account, it did so later when it refused to yield the proceeds up to CHoPP after the state court entered its final judgment. CHoPP failed to raise this wrongful retention claim in its original pleadings. In conjunction with a motion to reconsider, CHoPP requested leave to amend to assert that claim. The district court denied the motion to reconsider, and entered summary judgment in favor of the United States, without giving explicit consideration to CHoPP's request. We interpret the district court's action as an implicit denial of the request for leave to amend. We review that denial for an abuse of discretion, but are mindful of the strong policy in favor of permitting amendment. *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991).

What we have said already makes it clear that the district court did not abuse its discretion in denying leave to amend, for the amendment to state a wrongful retention claim would have been futile. We have rejected CHoPP's contention that the constructive trust vested title retroactively, at least in a manner that would render tortious prior levies by judgment creditors. CHoPP is simply not in the position of a plaintiff who seeks return of an identifiable res wrongfully taken or wrongfully retained. *See, e.g., People v. One 1960 Ford*, 39 Cal.Rptr. 636, 638 (Ct.App. 1964) (a true owner of misappropriated property stands above a mere creditor). CHoPP sought damages for fraud, and intended to pursue, with the state court's help, the PaineWebber funds as a means of satisfying its judgment. The United States, armed with its own prior, valid judgments, pursued the same funds and got there first. There was no flaw in the United States' title when it acquired the funds, and none appears now.

[7] CHoPP bears the burden of persuading us that it may bring this action. In a conversion case a "plaintiff must

recover, if at all, upon the strength of his own title and not upon the weakness of his adversary . . . ." *Lee On v. Long*, 234 P.2d 9, 12 (Cal. 1951) (citation omitted), *cert. denied*, 342 U.S. 947 (1952). The constructive trust, once imposed, undoubtedly gave CHoPP "some kind of an equitable interest" in the account, *Restatement of Restitution*, § 160 cmt. a (1937), but that interest was recognized after the government had made a perfectly lawful levy on the PaineWebber account. CHoPP's late-perfected interest is too weak to overcome the present ownership and possessory interest of the United States, lawfully acquired. To hold otherwise would permit CHoPP to gain priority over a preexisting judgment creditor that had satisfied its debt by levy of execution. We are unpersuaded that California courts would sanction that result. We therefore find no abuse of discretion in the district court's failure to permit amendment of the complaint.

III

CHoPP also seeks damages from the United States and PaineWebber on the ground that each violated the state court preliminary injunction. That injunction barred the transfer of funds from the PaineWebber account. The defendants maintain that they were not subject to the injunction.

We consider the threshold question whether civil damages are available under California law for the disobedience of a preliminary injunction. A civil contempt proceeding is the usual method of enforcement, 6 B.E. Witkin, *California Procedure* § 321 (3d ed. 1985), but we conclude that damages also may be awarded. One California court has observed:

> In some jurisdictions, where the disobedience of an injunction has resulted in pecuniary loss or injury to the plaintiff, the court, by reason of statute, may, in imposing punishment, award an amount sufficient to indemnify him for his loss, while in others relief is given in an independent action. . . . But whatever the

> form of the proceeding for relief, the right to recover as against one who, in disobedience of the mandate of the court, violates a right sought to be protected thereby, to the damage of another, or who knowingly aids and abets such violations, is generally recognized.

Kirby v. San Francisco Savings & Loan Soc'y, 273 P. 609, 609-10 (Cal.Ct.App. 1928); *see also Heinz v. Superior Court*, 266 P.2d 5, 12 (Cal. 1954) (civil damages may be collected for an act otherwise in contempt).

A

CHoPP concedes that the United States was neither a party, nor a privy to a party, named in the injunction. CHoPP argues that the government is bound as a successor in interest to Laurins. We disagree. Although California recognizes the concept of corporate succession, *see* 6 Witkin, *Summary* § 320, CHoPP cites no authority which supports the idea that the act of execution renders a judgment creditor subject to an injunction that bound the judgment debtor.

B

CHoPP concedes that PaineWebber, also, was not a party to the injunction. PaineWebber was bound, argues CHoPP, because it was Laurins' agent. An injunction binds the agent of a party named in the injunction, *Ross v. Superior Court*, 141 Cal.Rptr. 133, 138 (Cal. 1977), and a broker is ordinarily its client's agent. *See, e.g., Black v. Shearson, Hammill & Co.*, 72 Cal.Rptr. 157, 160 (Ct.App. 1968) (affirming judgment against brokers who defrauded clients).

We conclude, however, that PaineWebber acted on its own authority, and not as Laurins' agent, when it released funds from Laurins' account to the United States. The broker presumably acted against its client's wishes, but its action com-

plied with a valid levy backed up by a court order. This case therefore differs markedly from *Kirby*, the primary case in support of CHoPP's position. There, a bank released funds to a defendant named in the injunction. *Kirby*, 273 P. at 609.[7] Because PaineWebber was not bound as an agent by the injunction against Laurins, it incurred no liability for complying with the levy.[8]

IV

The United States and PaineWebber were entitled to summary judgment. CHoPP has no viable claim against either defendant for conversion of funds or for violation of an injunction. The judgment of the district court is

AFFIRMED.

REINHARDT, J., dissenting:

The majority holds that the United States can step in and seize the funds in a judgment debtor's investment account, even though it knows that a state court has *already* issued a preliminary injunction against the debtor's use of those funds in another judgment creditor's favor. I believe that the majority's opinion is unwarranted in light of existing precedent. I also believe that the majority erroneously rewards the government for its improper conduct. Accordingly, I dissent.

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[7] *Kirby* specifically addressed whether the bank could be held liable for violating an injunction on an aiding and abetting theory. *See id.* at 610 ("it is not claimed that the defendant acted as the agent or servant of Kirby").

[8] Because we determine that PaineWebber was not subject to the injunction, we do not address what effect the court order enforcing the levy could be given if it conflicted with the injunction.

A. Constructive Trust.

The majority argues that CHoPP cannot prevail on its conversion claim against the United States because CHoPP did not have ownership of the account on the date that the government seized the funds. *See* Majority Opinion, *supra*, at 10938-42 [hereinafter Maj. Op.]. The majority's argument is incorrect for the following reasons.

First, the majority errs in holding that CHoPP did not have ownership of the funds through a constructive trust. When it awarded final judgment in CHoPP's favor, the superior court imposed a constructive trust on the funds effective as of the date of the illegal stock transactions — a year and a half *before* the United States levied on the account. The judgment was not simply a retroactive award of title; it was an acknowledgement that CHoPP had equitable title to the funds *all along*. Indeed, as the majority acknowledges, a constructive trust springs into existence of its own force at the time of the commission of a fraud or mistake. *See Broder v. Conklin*, 53 P. 699, 701 (Cal. 1898); *see also Majewsky v. Empire Construction Co.*, 467 P.2d 547, 556 n.4 (Cal. 1970) (Tobriner, J., dissenting) ("[T]he imposition of a constructive trust restores title to plaintiff *ab initio*.").

Second, the majority errs in holding that "[t]here is no California law that suggests that CHoPP may rely upon a 1990 judgment to impede satisfaction in 1988 of a competing judgment that was already final." Maj. Op., *supra*, at 10939. To the contrary, it is well established under California law that a constructive trust elevates substance over form in order to achieve just results. *See, e.g., Edwards-Town, Inc. v. Dimin*, 87 Cal. Rptr. 726, 730-31 (Cal. Ct. App. 1970); *Sanguinetti v. Rossen*, 107 P. 560, 562 (Cal. Dist. Ct. App. 1906). Accordingly, the superior court's imposition of a constructive trust as

of the date of Laurin's illegal transactions was valid under established state law.[1]

Third, the majority errs in concluding that CHoPP's rule would discourage collection by other creditors any time the first creditor initiates an action that may result in a constructive trust. *See* Maj. Op., *supra*, at p. 10940. The majority fails to recognize, however, that "mere initiation" is insufficient to impose a constructive trust — the first creditor must *win* final judgment in his favor before such a trust can be imposed. Accordingly, meritless claims by judgment creditors would fail, and no constructive trust would result from such actions. By contrast, worthy claims would succeed, and the first creditor to file such a claim would rightly be entitled to what he is owed. Ironically, the majority itself creates a perverse and unjust rule that punishes creditors who file their claims first (in this case, CHoPP), and rewards creditors who file their claims later (in this case, the United States).

Fourth, the majority errs in citing *Coppinger v. Superior Court*, 185 Cal. Rptr. 24 (Cal. Ct. App. 1982); and *Urez Corp. v. Superior Court*, 235 Cal. Rptr. 837 (Cal. Ct. App. 1987) for the proposition that "California discourages the use of equitable remedies to ward off competing lienholders." *See* Maj. Op., *supra*, at 10940-41. Both cases are inapposite here because they deal with the special doctrine of *lis pendens*, in which notice of pending litigation against real property is filed in the county recorder's office.[2] In any event, I reject the

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[1]For a more detailed discussion of why the majority's holding is unjust, see page 10951, below.

[2]Because notice of pending litigation against the real property is filed in a centralized location, all potential creditors have constructive notice of the action. *See* 43 Cal. Jur. 3d *Lis Pendens* §§ 1-7, at 293-304 (1978). Accordingly, it is not surprising that California law discourages the use of equitable remedies (such as the imposition of a constructive trust); all creditors with legitimate claims have already been put on notice at the outset of the litigation.

majority's argument that CHoPP's rule "ward[s] off competing lienholders." As discussed above, CHoPP's rule properly creates an incentive for creditors with meritorious claims to file their claims *first*. By contrast, the majority's rule wards off diligent creditors and rewards the lazy ones.

B. Government Misconduct.

Even if CHoPP did not have ownership of the account at the time of the government's seizure of the funds, I would hold that the United States' misconduct excuses CHoPP from meeting the contemporaneous ownership element of a conversion claim.

The majority errs in holding that the government's levy was valid under California law. *See* Maj. Op., *supra*, at 10942-43. California law clearly establishes that a levy upon property that is the subject of an action is not effective. *See* Cal. Civ. Proc. Code § 700.180(b) (West 1987); *cf. Custer v. McCutcheon*, 283 U.S. 514, 519 (1931) (holding that the United State is bound by state law restrictions on execution). Because the account was the subject of an existing action at the time of the government's seizure (the superior court injunction), the government's levy is ineffective.

The majority tries to distinguish § 700.180(b) by contending that the provision only applies to suits that "determine ownership" of the subject of the action. This contention is inconsistent with the fact that CHoPP sought and obtained ownership over the illegal stock profits contained in the account. A constructive trust signifies a property interest; it is

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By contrast, this case involves a creditor — CHoPP — who had *absolutely no notice* of the United States' intention to levy on the disputed property. *See infra* p. 10951. Accordingly, the doctrine of *lis pendens* is completely inapplicable, and equitable remedies in CHoPP's favor are appropriate.

not merely a device for recovering money damages. *See, e.g., Bainbridge v. Stoner*, 106 P.2d 423, 427 (Cal. 1940); *cf.* 11 B.E. Witkin, *Summary of California Law* § 142(b), at 998 (9th ed. 1990) (establishing that a beneficiary of a constructive trust has priority over the other creditors of the trustee).

In any event, barring the plaintiff's conversion suit would reward the defendant for its improper conduct. The United States' defense to the conversion claim is that it seized the account proceeds *before* CHoPP was able to obtain a final judgment establishing title to the account, thus frustrating CHoPP's ability to meet the contemporaneous ownership element of conversion. The United States only attained the chronological edge that now forms the core of the majority's opinion by levying on property that was the subject of pending litigation in violation of California law. Further, the United States levied on property with knowledge of the preliminary injunction and without notifying CHoPP of its intent to do so. We should not reward the United States for its amoral behavior by turning an illegal act into an irremediable *fait accompli*. Rather, we should hold that, since CHoPP's ultimate ownership of the property is not in doubt, the United States' wrongful seizure of the property excuses CHoPP from the need to show contemporaneous ownership in order to recover for conversion. Because there are no material factual disputes regarding the conversion theory, I would direct the district court to grant summary judgment against the United States on this ground.

C. Right to Possession.

The majority also errs in rejecting CHoPP's argument that a right to possession over the disputed property is not necessary in order to bring a conversion claim. The majority dismisses CHoPP's argument that *Taylor v. S&M Lamp Co.*, 12 Cal. Rptr. 323 (Cal. Dist. Ct. App. 1961); and *Reynolds v. Lerman*, 292 P.2d 559 (Cal. Dist. Ct. App. 1956), are control-

ling in this case. Both cases held that a plaintiff with title need not have a right to possession to bring a conversion claim.

The majority contends that *Taylor* and *Reynolds* are "not of aid" because CHoPP has shown neither "a right to possession" nor "title." *See* Maj. Op., *supra*, at 10943. This argument completely baffles me, however. First, it is illogical to require CHoPP to show "a right to possession" before it can bring its conversion claim. *Taylor* and *Reynolds* stand precisely for the proposition that the right to possession is *not necessary* in order to prevent one who wrongfully assumes dominion over property from benefitting from his own wrong. *See Taylor*, 12 Cal. Rptr. at 330; *Reynolds*, 292 P.2d at 566. To me, the majority's requirement that CHoPP must show a right to possession *before* it can prove that right to possession is not necessary seems wholly illogical. Second, CHoPP has *already* shown a right to "title" in the disputed property. Here, as in *Taylor* and *Reynolds*, it is only the *timeliness* of the plaintiff's ownership interest that is in doubt — that CHoPP ultimately obtained title to the funds is not seriously disputed by either party. The fact that the majority concludes that CHoPP did not have ownership at the time of the government's seizure of the funds does not change the fact that CHoPP ultimately obtained title to the property. Thus, it *was* demonstrated that CHoPP had a right to title. Accordingly, *Taylor* and *Reynolds* are "of aid," and CHoPP should be permitted to bring its conversion claim.

D. Damages.

Finally, the majority errs in holding that PaineWebber, the custodian of the account, was not liable for violating the superior court's preliminary injunction. *See* Maj. Op., *supra*, at 10946-47.

A threshold question is whether civil damages are available for the violation of a preliminary injunction. I think it plain that they are. *See, e.g., Kirby v. San Francisco Sav. & Loan*

Soc'y, 273 P. 609, 610 (Cal. Dist. Ct. App. 1928) ("[T]he right to recover as against one who, in disobedience of the mandate of the court, violates a right sought to be protected thereby, to the damage of another, or who knowingly aids and abets such violation, is generally recognized.");[3] *see also Heinz v. Superior Court*, 266 P.2d 5, 12 (Cal. 1954) ("Civil damages may be collected in an ordinary civil action for an act otherwise a contempt." (internal quotes omitted)); *In Re Morris*, 227 P. 914, 916 (Cal. 1924). Any other result would create a gap in California's comprehensive law of remedies. *See* Cal. Civ. Code § 3523 (Deering 1984) ("For every wrong there is a remedy.").

The real question is whether either of the defendants was *bound* by the preliminary injunction. Neither the U.S. nor PaineWebber was a party to the Superior Court action in which CHoPP obtained the injunction, and neither was explicitly named in the injunction. However, under California law, an injunction applies not only to the parties named in the court order but to their successors-in-interest, *agents*, employees, and those who aid and abet the injunction's violation, provided they have notice of the injunction.[4] *See, e.g., Ross v. Superior Court*, 569 P.2d 727, 731 (Cal. 1977); *Katenkamp v. Superior Court*, 108 P.2d 1, 3 (Cal. 1940); *Berger v. Superior Court*, 167 P. 143, 144 (Cal. 1917); *Pitchess v. Superior Court*, 83 Cal. Rptr. 41, 43 (Cal. Ct. App. 1969); 38 Cal. Jur. 3d *Injunctions* § 94, at 607 (1977).

I am persuaded that PaineWebber was bound by the preliminary injunction because it was Laurins' agent. *See Black v.*

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[3]The majority opinion's attempt to distinguish *Kirby*, *see* Maj. Op., *supra*, at 10947, is inapplicable here. This section discusses *Kirby*'s holding as to the general availability of damages for a violation of an injunction, which is a separate question from whether PaineWebber *in fact* violated an injunction in this case. I address the latter question at pages 10953-54, below.

[4]The United States and PaineWebber both concede that they had notice of the injunction.

Shearson, Hammill & Co., 72 Cal. Rptr. 157, 160 (Cal. Ct. App. 1968) (stock broker ordinarily serves his customers as an agent). The majority incorrectly contends that PaineWebber was not an agent because it "acted on its own authority" in turning over the money to the United States. Maj. Op., *supra*, at 10946. Whether PaineWebber actually exercised independent judgment in this particular instance, however, does not change the fact that PaineWebber had *general authorization* from Laurin to act on his behalf. Accordingly, PaineWebber was Laurin's agent. As Laurins' agent, PaineWebber was prohibited "from . . . withdrawing or transferring, directly or indirectly, any proceeds of any 'short' sale of CHoPP stock." C.R. 1 at 9. This is so even though the injunction did not explicitly bind Laurins' agents; agents are implicitly covered. *See Ross*, 569 P.2d at 731. PaineWebber therefore violated the preliminary injunction when it transferred the funds in the Laurins account to the United States.

PaineWebber is not insulated from liability by the fact that it was under a district court order to turn the account proceeds over to the United States. When served with the United States' writs of execution, PaineWebber invited the United States to seek a court order enforcing the writs, and then made no attempt to notify the district court of the fact that the account proceeds were the subject of a preliminary injunction and an ongoing dispute in state court. Had it done so, the district court most likely would have declined to issue its order.[8] PaineWebber also failed to notify CHoPP that it had been served with writs of execution, and failed to take advantage of California's designated procedure for levying on property subject to litigation. See Cal. Civ. Proc. Code § 700.180(e) (West 1987). Thus, to the extent that PaineWebber was sub-

[8]Had the Superior court litigation been brought to the attention of the district court, the district court would have realized that the United States could not lawfully levy on the Laurins account under California law. See pages 10949-51, above. It therefore would have declined to issue an order enforcing the writs of execution.

ject to contradictory Superior and District court orders regarding the funds, this was a problem of its own creation.[6]

Because there are no material factual issues in dispute here, I would reverse and remand with directions to enter summary judgment against PaineWebber on the preliminary injunction theory.

* * *

For the above reasons, I dissent.

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[6]My views of the conversion and preliminary injunction claims make it unnecessary for me to reach the parties' exchange regarding the collateral estoppel effect of the state court judgment. *See* Blue Brief at n.11; Red Brief at n.4; Gray Brief at n.1; District Court Opinion at 5. In addition, my conclusion that the United States committed a conversion by improperly levying on the funds obviates the need to resolve CHoPP's claim that the United States committed a conversion by wrongfully *witholding* the trust corpus after the 1990 superior court judgment. *See* Maj. Op., *supra*, at 10944-45; Blue Brief at n.10.

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APPENDIX B

JUDGMENT FILED FEBRUARY 25, 1994

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-15991
CT/AG#: CV-91-00226-RHS

CHOPP COMPUTER CORPORATION, INC., a British Columbia Corporation
Plaintiff - Appellant

v.

UNITED STATES OF AMERICA; PAINEWEBBER INCORPORATED, a Delaware Corporation
Defendants - Appellees

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the

judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered September 29, 1993

APPENDIX C

FILED FEBRUARY 16, 1994

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CA No. 91-15991
DC No. CV-91-00226-RHS

CHOPP COMPUTER CORPORATION, INC., a British Columbia Corporation,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; PAINEWEBBER INCORPORATED, a Delaware Corporation,

Defendants-Appellees.

ORDER

BEFORE:

CANBY, REINHARDT and LEAVY, Circuit Judges

Judges Canby and Leavy have voted to deny the petition for rehearing. Judge Reinhardt would grant the petition for rehearing. Judges Canby, Reinhardt and Leavy reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en bank rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

FILED APRIL 5, 1991

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

No. C-91-0226-RHS

CHoPP COMPUTER CORPORATION, INC., a British Columbia corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA and PAINEWEBBER INCORPORATED, a Delaware corporation,

Defendants.

ORDER

On 15 March 1991 there was a hearing on the summary judgment motions of plaintiff CHoPP Computer Corporation, Inc. (hereinafter "CHoPP Computer") and defendant United States of America (hereinafter, "United States"). The only other party in this civil action is defendant PaineWebber Incorporated (hereinafter, "PaineWebber").

This action arises out of United States's receipt of $694,000 from a PaineWebber account that had been used, by Alex Laurins and others, to conduct illegal transactions involving CHoPP Computer stock. The $694,000 was used to satisfy two judgments in United States's favor. One judgment was against Laurins, and the other judgment was against a corporation that allegedly was Laurins's alter ego.

The complaint in the action at bar alleges that United States's receipt of the $694,000 constitutes: (a) breach of an oral contract; (b) violation of a preliminary injunction; and (c) conversion.

However, in connection with the summary judgment motions, CHoPP Computer does not rely on the breach-of-contract allegations. This non-reliance is consistent with the fact that CHoPP Computer is suing United States only under the Federal Tort Claims

Act (hereinafter, "FTCA"). Contrary to a contention by United States, FTCA applies to conversion [see Nottingham, Ltd. v. United States, 741 F. Supp. 1445, 1446-1447 (C.D. Cal. 1989), 741 F. Supp. 1447, 1448-1449 (C.D. Cal. 1990)]. It is undisputed that FTCA applies to violation of a preliminary injunction.

United States contends, though, that CHoPP Computer's FTCA causes of action are time-barred because the 28 March 1990 filing of the relevant administrative claim occurred over two years after service, in or before February 1988, of the writs of execution pursuant to which United States received the $694,000. However, United States notes that, under federal law, a tort cause of action accrues at the time of the alleged injury to plaintiff. And the alleged injury to CHoPP Computer occurred no earlier than United States's April 1988

receipt of the $694,000. Indeed, this receipt resulted from an order issued, by a judge of the United States District Court for the Northern District of California, on 29 March 1988, just under two years before the administrative claim was filed. Therefore, CHoPP Computer's FTCA causes of action are not time-barred.

It is undisputed, though, that United States is not liable to CHoPP Computer under FTCA unless, under California law, a private person under similar circumstances would be liable to CHoPP Computer [see McMurray v. United States, 918 F.2d 834, 836 (9th Cir. 1990)].

The preliminary injunction allegedly violated by United States: (a) was issued in August 1986 in a San Francisco Superior Court action wherein CHoPP Computer, as plaintiff, asserted that Laurins and others--not including United States or PaineWebber-

-had engaged in illegal transactions involving CHoPP Computer stock; and (b) froze the PaineWebber account that contained the $694,000 later received by United States.

The preliminary injunction was directed only against "defendants" in the Superior court action. United States was neither a defendant therein nor an agent, an officer, or an employee of any such defendant. Furthermore, before receiving the $694,000, United States was not a successor in interest to any defendant in the Superior Court action. Thus, United States's receipt of the $694,000 did not violate the preliminary injunction. Then too, authorities relied on by CHoPP Computer indicate that the appropriate remedy for violation of a California state-court preliminary injunction is a contempt

proceeding, which the action at bar certainly is not.

Under California law, conversion is one's wrongful exercise of dominion over personal property of another individual or entity [Nottingham, Ltd. v. United States, supra at 1447]. In October 1990 the San Francisco Superior Court action was terminated, in CHoPP Computer's favor, by a judgment that provides in relevant part:

> Effective as of the dates of the [illegal stock] transactions, a constructive trust is imposed on all profits from any transaction in CHoPP [Computer] stock by, or on behalf of, for the benefit of, or in the name of[,] any [d]efendant.

However, in the period up to and including United States's April 1988 receipt of the $694,000: (a) CHoPP Computer never actually had possessed any of this money; and (b) no court had ruled that CHoPP Computer was entitled to any of this money. Thus, at

least absent the October 1990 judgment, there is no viable conversion cause of action for CHoPP Computer against United States, even if United States's execution against the PaineWebber account was ineffective under California law.

Furthermore, the October 1990 judgment came after the August 1990 denial of CHoPP Computer's administrative claim. Therefore, such denial appears to be proper. And it does not appear that there can be a meritorious FTCA cause of action if denial of the relevant administrative claim was proper.

CHoPP Computer contends that the October 1990 judgment has a collateral estoppel effect against United States, as Laurins's successor in interest. In view of the judgment's quoted language, though, any collateral estoppel effect against United States is limited to the imposing of a

constructive trust, as distinct from the awarding of money damages, against United States.

But equitable relief is not available under FTCA, except perhaps in aid of a judgment for money damages [see Walker v. United States, 116 F.R.D. 149, 152 (S.D.N.Y. 1987)]. And there does appear to be any proper basis for awarding, in the action at bar, money damages against United States. Therefore, imposition of a constructive trust against United States would be inappropriate in the action at bar.

This District Court hereby: (a) grants United States's summary judgment motion; and (b) denies CHoPP Computer's summary judgment motion.

Dated: 2 April 1991

/s/ Robert H. Schnacke
Robert H. Schnacke
United States District Judge

APPENDIX E

ENTERED IN CIVIL DOCKET JUNE 10, 1991

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

No. C-91-0226-RHS
FINAL JUDGMENT

CHoPP COMPUTER CORPORATION, INC., a British Columbia corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA and PAINEWEBBER INCORPORATED, a Delaware corporation,

Defendants.

The Court, after a hearing on March 15, 1991, having granted the motion filed by defendant United States of America ("United States") for summary judgment on all claims asserted in the complaint (the "Claims") filed by plaintiff CHoPP Computer Corporation, Inc. ("CHoPP Computer") and having denied CHoPP Computer's cross-motion

for summary judgment with respect to the Claims; and, after a hearing on May 24, 1991, having denied CHoPP Computer's motion for reconsideration of the Court's prior order; and, after a hearing on May 24, 1991, having granted the motion of defendant PaineWebber Incorporated ("PaineWebber") for summary judgment on the Claims, having denied PaineWebber's request for sanctions under Fed. R. Civ. P. 11, and having denied CHoPP Computer's cross-motion for summary judgment on the Claims;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED pursuant to Fed. R. Civ. P. 58 that CHoPP Computer shall take nothing by its complaint in this action and this action is dismissed in its entirety with prejudice.

Dated: June 5, 1991.

/s/ Robert H. Schnacke
United States District Judge

Approved as to form by:

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